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In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 554 F. 2d 398. The order of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1977 (Pet. App. C). On May 12, 1977, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to June 25, 1977, and the petition was filed on June 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, convicted of committing a complex mail fraud, was deprived of effective assistance of counsel because his retained attorneys, who were aware of petitioner's mental problems, chose to rely on other defenses inconsistent with an insanity defense.

2. Whether, in the circumstances of this case, the government was required to prove that petitioner had a fiduciary relationship with the victims of his mail fraud scheme.

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on 20 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to two years' imprisonment and fined $1,000 on each count, the sentences to run concurrently. On appeal, the court of appeals reversed the convictions on five counts (counts I, II, III, V, and VII) because the evidence was insufficient to prove that the alleged offenses occurred within the five-year statute of limitations, but it affirmed the convictions on the other counts (Pet. App. 1a-25a).

The evidence at trial is set forth in the opinion of the court of appeals (Pet. App. 2a-3a). Briefly, it showed that, as president of the Central Southwest Oil Corporation, petitioner directed a nationwide mail fraud scheme that essentially involved persuading customers to enter the government's monthly "lottery" for the leasing of oil and gas rights and, if the customer won, fraudulently inducing him to assign the lease to Central at a price far

below market value (counts I-VIII).[1] Petitioner then reassigned the lease, often to a large oil company, at a substantial profit (Pet. App. 2a-3a, 23a, n. 26). The remaining counts involved the fraudulent sale of royalty deeds in supposedly valuable oil lands (*id.* at 3a).[2]

ARGUMENT

1. Petitioner contends (Pet. 10-15) that he was deprived of his Sixth Amendment right to the effective assistance of counsel because his trial attorneys—retained counsel who were experienced in the defense of mail fraud prosecutions—did not discover and present an insanity defense. The court of appeals correctly rejected this claim.

The record clearly reflects that petitioner's attorneys were aware prior to and during trial that petitioner had been treated for mental illness at approximately the same time as he was conducting his mail fraud operation (Pet. App. 7a-9a). In support of a motion for a continuance filed in September 1974, four months before trial, petitioner's counsel presented a letter from a psychiatrist who had diagnosed petitioner's illness as "Manic Depressive Reaction" (*id.* at 7a, n. 8). The letter also said that petitioner "has experienced both manic and depressive episodes, the depression being more 'frequent and devastating;' that in depression [petitioner] becomes withdrawn, experiences overwhelming emotional anxiety, and 'is essentially not able to function in any meaningful capacity;' [and] that if [petitioner] is again depressed

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[1]Counts IX and X involved a similar scheme in which petitioner fraudulently purchased overriding royalties from customers who had been successful in the lottery.

[2]A more detailed statement of the proof at trial on each of these counts is contained in pp. 2-16 of the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

and if he had to appear in court, 'he in no way could intellectually function in his own behalf . . .'" (*ibid.*). Moreover, petitioner himself testified at trial about his mental illness and hospitalization, saying that he had received chemical treatment and electroshock therapy during the period of the alleged offenses and that the treatment had caused him to forget some of the details of the leasing operation (*id.* at 9a).[3]

Although a post-trial medical report further indicated that an insanity defense could have been developed at trial, both courts below correctly determined that petitioner's attorneys had ample knowledge prior to trial of petitioner's mental problems. Accordingly, they properly denied petitioner's motion for a new trial on the grounds of "newly discovered" evidence of insanity, because trial counsel had not met the requirement of due diligence (Pet. App. 10a, 26a-28a). See, *e.g.*, *United States* v. *Stofsky*, 527 F. 2d 237, 244-245 (C.A. 2), certiorari denied *sub nom.* *Hoff* v. *United States*, 429 U.S. 819; *United States* v. *Anderson*, 509 F. 2d 312, 327, n. 105 (C.A. D.C.), certiorari denied, 420 U.S. 991.

Nor do these facts demonstrate that petitioner received constitutionally ineffective assistance of counsel. As the court of appeals observed in rejecting petitioner's "attempt to transform the argument [for a new trial] into one of ineffective counsel" (Pet. App. 8a):

> It seems clear that despite the awareness by [petitioner] and his counsel of the mental problem, it was simply not presented as a defense. To

[3]The court of appeals noted: "Occasionally [petitioner] said that he could not remember specifics, but the points involved were not of major importance" (Pet. App. 9a, n. 9).

> grant a new trial on a claim of ineffective counsel on this record would put a premium on neglect and would encourage a strategy of not making use of available information, with the thought that its later "discovery" might be the basis for a new trial if the verdict was adverse [*id.* at 11a].

Contrary to petitioner's assertions (Pet. 10-15), the court's language suggests not that it was applying a new, more stringent standard for the testing of effective assistance of counsel claims, but rather that it was legitimately concerned that defense lawyers might deliberately avoid presenting a defense at trial in the hope that the omission might be raised, if necessary, in a motion for a new trial or on appeal. Cf. *Wainwright* v. *Sykes*, No. 75-1578, decided June 23, 1977, slip op. 16-17. The standard in the Tenth Circuit for determining whether a defendant has received the effective assistance of counsel continues to be the traditional "farce and mockery" test, as decisions rendered by the court of appeals both before and after this case indicate. See, *e.g.*, *Hayes* v. *United States*, C.A. 10, No. 76-2036, decided May 25, 1977, pending on petition for a writ of certiorari, No. 76-6959; *Gillihan* v. *Rodriguez*, 551 F. 2d 1182, 1187 (C.A. 10); *United States* v. *Dingle*, 546 F. 2d 1378, 1385 (C.A. 10). Whether one applies this standard or the "reasonableness" test followed in some circuits (see Pet. 11), the trial record here convincingly demonstrates that the performance of petitioner's counsel was well "within the range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, 397 U.S. 759, 771). Hence, this case presents no occasion for the resolution of whatever differences may exist among the courts of appeals on this issue. See *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003.

Much of the testimony during petitioner's three-week trial was necessarily devoted to explaining petitioner's sophisticated operation for defrauding victims of valuable oil leases and reassigning the leases to oil companies at immense profits to himself.[4] The success of petitioner's business required detailed knowledge of the interests and methods of the major oil companies, evaluation of scientific data to determine the oil potential of particular tracts, and a complete understanding of the esoterics of retained overriding royalty interests. In light of this proof, it is not surprising that petitioner's counsel rejected the idea of relying on a defense of insanity and instead chose to argue that petitioner's transactions with his customers had occurred at arm's length, that petitioner was not required to disclose facts alleged by the government to be material to the sales, and that there had been no scheme to defraud (Pet. 4).[5] Petitioner consistently

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[4]The evidence of fraud and misrepresentation on some of the counts is summarized by the court of appeals at Pet. App. 23a, n. 26.

[5]Substantial evidence indicated that petitioner fully appreciated the wrongfulness of his conduct. For example, after learning that his activities were being investigated, petitioner induced a geologist to prepare and backdate a misleading geological report on the oil potential of certain land which petitioner had fraudulently sold as valuable oil property (Vol. XXIV, Tr. 1310-1319). He threatened an employee to prevent her from giving information to the government (Vol. XXIV, Tr. 1358-1362) and destroyed records of his conversations with clients (Vol. XXIV, Tr. 1363-1364). Moreover, the psychiatrist's post-trial affidavit noted that petitioner had been suffering from mental illness since late 1968 (Pet. App. 6a). Although all of the illegal transactions alleged in the indictment occurred after 1968, petitioner testified that he had been operating his leasing service in the same manner (*i.e.*, by attempting to buy back leases from successful customers) since 1963 and that his business methods had been investigated and approved by the government (Vol. XVI, Tr. 100, 102). Thus, petitioner could not have claimed consistently both that he was operating "business as usual" during the time period of the

maintained at trial that his business tactics were completely legal and no different from the practices of any successful businessman (see, *e.g.*, Vol. XXXI, Tr. 2477-2479, 2486-2488, 2501-2502, 2505-2506); indeed, as the court of appeals noted (Pet. App. 9a, n. 9), petitioner himself "testified in detail about the conversations, trips and documents involved and * * * his testimony was generally thorough and direct and denied wrongdoing in the various transactions."

In sum, petitioner's counsel were well aware during their pre-trial preparation that petitioner had a possible insanity defense available to him, yet they reasonably determined to present an alternative defense inconsistent with insanity[6]– the claim that petitioner gave his customers a fair deal, which they were eager to accept and which often resulted in their receiving a profit many times their original investment (see, *e.g.*, Vol. XXXI, Tr. 2486-2487, 2490, 2493-2495)—which found some support in the record, which squared far more closely than did a claim of insanity with the government's strong proof that petitioner had knowingly committed the numerous acts charged as fraudulent, and (perhaps most significantly) which was more in keeping with petitioner's obvious desire not to jeopardize his reputation as a trustworthy businessman. Although in retrospect an insanity defense

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allegedly fraudulent transactions and that the fraudulent transactions were the product of his mental condition.

[6]An insanity defense usually presumes that the defendant committed all the elements of the offense charged but lacked the requisite intent. Cf. *Kaufman* v. *United States*, 394 U.S. 217, 229-230. Here petitioner steadfastly refused to admit any wrongdoing or misrepresentation in his transactions.

might have proven more successful, trial counsel's responsible tactical decision to rely on the "good business" approach did not deprive petitioner of constitutionally adequate representation. Cf. *Wainwright* v. *Sykes*, *supra*, slip op. 18, n. 14; *Estelle* v. *Williams*, 425 U.S. 501, 512.[7]

2. Petitioner also objects (Pet. 15-19) to the district court's instruction to the jury that the government was not required to prove, as an element of the crime of mail fraud, that a fiduciary relationship existed between petitioner and his customers. Petitioner did not object to this instruction when it was given (Pet. 4) and, as this Court has recently remarked, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977, slip op. 8. In any event, as the court of appeals properly found (Pet. App. 22a-23a), "fraudulent representations, as the term is used in 18 U.S.C.A. § 1341, may be effected by deceitful statements of half-truths or the concealment of material facts and the devising of a scheme for obtaining money or property by such statements or concealments is within the prohibition of the statute." Although petitioner claims that the alleged non-disclosures in counts I-VIII could not have been fraudulent in the absence of a fiduciary relationship, the court below correctly observed that there was sufficient

[7]Although petitioner relies heavily on his counsel's post-trial statement that he would have presented an insanity defense if he had been more fully informed of the seriousness of petitioner's mental illness (Pet. 4-5), the lower courts could properly discount this admission, which "merely reflects the natural subjective expectation of an unsuccessful advocate that improvement can be made the second time around" (*Alire* v. *United States*, 365 F. 2d 278, 279 (C.A. 10)), and which was made prior to petitioner's sentencing in an obvious appeal for leniency.

proof of affirmative misrepresentations to support petitioner's convictions on counts IV, VI, and VIII—the only counts involving alleged fraudulent non-disclosures that were affirmed on appeal—regardless of the existence of a fiduciary duty (*id.* at 23a, n. 26).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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